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IN THE

Supreme Court of the United States

October Term, 1955

No. 432

GEORGE WILLIAM BREWER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Contentions in Support Thereof.

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To the Honorable Supreme Court of the United States:

George William Brewer, your petitioner, and Herbert Ashley Carter and Jesse Ray Ortiz, were tried and convicted by a jury of violation of Section 2314, Title 18, U. S. C. A further defendant Eugene Delbert Standish, pleaded guilty. Petitioner, Carter and Ortiz appealed to the Court of Appeals for the Fifth Circuit. Neither Carter, Ortiz nor Standish are parties to this proceeding.

Pursuant to Rule 23 of this court petitioner respectfully shows:

Opinions of the Court Below.

Of course, the District Court delivered no opinion. The opinion of the Court of Appeals for the Fifth Circuit [R. 143-148] has been reported at 224 F. 2d 189. A copy of that opinion is appended hereto as Appendix A. No opinion was written by the Court of Appeals in denying the Petition for Rehearing [R. 151, 163].

Statement of Grounds Upon Which the Jurisdiction of This Court Is Invoked.

1. The judgment sought to be reviewed is dated July 15, 1955. The date of its entry is July 15, 1955 [R. 149]. The judgment of the District Court is dated January 25, 1955, and it was entered January 25, 1955 [R. 6].

2. Timely Petition for Rehearing was filed [R. 151]. Rehearing was denied on September 3, 1955 [R. 163] without opinion. No extension of time was requested within which to petition for certiorari nor was any order made with respect thereto.

3. This court has jurisdiction to review the judgment in question by writ of certiorari under the provisions of Section 1254(1), Title 28, U. S. C., reading:

> "1254. Courts of appeals; certiorari; appeal; certified questions
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . ."

Questions Presented for Review.

1. In the District Court's charge to the jury was there such a departure from the accepted and usual course of judicial proceedings as to result in a conviction without due process of law, particularly in that the trial court failed to instruct the jury on the essential elements of the crime charged?

2. On the uncontroverted facts did the trial court err in denying petitioner's motion for judgment of acquittal—

(a) at the close of the prosecution's case in chief [R. 127], and

(b) at the close of all of the evidence [R. 128].

The Statute Involved.

"Sec. 2314. Transportation of stolen goods, securities, monies, or articles used in counterfeiting.

* * * * * * * *

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited; . . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both." (Sec. 2314, Title 18, U. S. C.)

Concise Statement of the Case and the Facts Material to the Consideration of the Questions Presented.

Petitioner and his three co-defendants were indicted (as stated in the opinion of the Court of Appeals [R. 143]):

"for conspiracy to violate 18 U. S. C. A. 2314, and for the substantive offense of causing to be trans-

ported in interstate commerce, 'to wit, from Dallas, Texas, to Tulsa, Oklahoma, a certain falsely made, forged, and counterfeited cashier's check, to wit, a certain cashier's check dated November 12, 1953, signed G. L. Metz, drawn on the Tulsa Bank of Commerce, Tulsa, Oklahoma, and made payable to J. &. B. Liquors in the sum of $10,117.00, and the said defendants, and each of them, then and there well knew the said check to have been falsely made, forged, and counterfeited.' Standish pleaded guilty prior to the trial. The court, in its charge to the jury, submitted the case against the three appellants only on Count 2, charging the substantive offense, 'which in the judgment of the (District) court adequately covers the issues raised.'"

The jury returned a verdict finding each of the defendents guilty. Petitioner was sentenced to a term of seven years imprisonment [R. 6]. He is still in custody, his application for bail pending the termination of his appeal having been refused [R. 139].

The prosecution's evidence showed that the defendants made a purchase of a truckload of whiskey in Dallas, Texas, from J & B Liquors and paid therefor the check mentioned. The check was delivered in Dallas, Texas, and was drawn on Tulsa Bank of Commerce, of Tulsa, a non-existent bank. The check was deposited by J & B Liquors in its bank account at Fair Park National Bank of Dallas in Dallas, Texas. That bank sent it to Tulsa, Oklahoma, where payment was refused and the check was returned to the Dallas bank marked "Bogus" [R. 42]. Neither this petitioner nor any of his co-defendants offered any evidence.

As pointed out in the opinion of the Court of Appeals [App. 4, R. 146], the points raised on the appeal and which are here stressed are:

(a) Denial of a motion for judgment of acquittal, and

(b) General defectiveness and insufficiency of the District Court's charge on the law of the case.

The basis for Federal jurisdiction in the United States District Court for the Northern District of Texas, Dallas, Division, is based upon the Federal statute (Sec. 2314, Title 18, U. S. C.), and the alleged transportation by the petitioner of a false, forged and counterfeited check in interstate commerce from Dallas, Texas, to Tulsa, Oklahoma.

Concise Argument Amplifying the Reasons Relied Upon for the Allowance of the Writ of Certiorari.

There are special and important reasons for the granting of the writ in this instance because in the opinion of petitioner the Court of Appeals for the Fifth Circuit

(a) Rendered a decision in conflict with the decisions of other courts of appeal on the same matter.

(b) Has decided a Federal question in a way in conflict with applicable decisions of this Honorable Court, and

(c) Has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the lower or District Court as to call for an exercise of this Honorable Court's power of supervision.

As to Question 1.

> Was there such a departure from the accepted and usual course of judicial proceedings in the District Court's charge to the jury as to result in a conviction without due process of law and is the holding of the Court of Appeals for the Fifth Circuit on that point in conflict with the decisions of other Courts of Appeal on the same matter?

We feel both parts of the question should be answered in the affirmative.

This Honorable Court will, of course, read the trial court's charge. It is set out in full in pages 128 to 132 of the Record.

The Court of Appeals brushed aside the claim as to the insufficiency of the charge by saying:

> ". . . Nor is it necessary to consider the general criticism of the court's oral charge to the jury, for the reason that when afforded an opportunity to object to that charge, no objection or exception was forthcoming from counsel for the defenndants, except the following: 'The only one we have, we except to the action of the court in failing to submit our charge on circumstantial evidence, being Charge Number One.'" [App. 5, R. 147.]

Of course, it is fundamental that:

> "In a criminal case the court must instruct on all essential questions of law involved, *whether or not it is requested to do so. Kreiner v. United States,* 2 Cir., 11 Fed. 2d 722; *Kinard v. United States,* 68 App. D. C. 250, 96 Fed. 2d 522; *Morris v. United States,* 9 Cir., 156 Fed. 2d 525; *United States v. Levy,* 3 Cir., 153 Fed. 2d 995; *Corson v. United*

States, 9 Cir., 147 Fed. 2d 437; *Miller v. United States,* 10 Cir., 120 Fed. 2d 968; *Screws v. United States,* 325 U. S. 91, 107, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 A. L. R. 1330; *United States v. Noble,* 3 Cir., 155 Fed. 2d 315; *United States v. Pincourt,* 3 Cir., 159 Fed. 2d 917; see 169 A. L. R. 305-355 on the subject generally." *Samuel v. United States* (9th Cir.), 169 F. 2d 787, 792. (Emphasis supplied.)

That part of the statute (Sec. 2314, Title 18, U. S. C.) under which this petitioner was charged and convicted reads:

> "Whoever, with *unlawful* or *fraudulent intent,* transports in interstate or foreign commerce any *falsely made, forged, altered, or counterfeited securities, knowing* the same to have been falsely made, forged, altered or counterfeited"; (emphasis supplied)

shall be guilty of an offense.

The statute is replete with legal words and phrases upon which the trial court gave no instruction whatever for the guidance of the jury. The jury was never advised by the trial court as to what constitutes "fraudulent intent" as used in this statute, nor as to the meaning of "transports in interstate commerce," or what constitutes "interstate commerce," or what must be found by the jury before they could find a security was "forged" or "counterfeited" or even "altered" as used in this statute. Indeed, the jury was not even told what was meant by "security" as used here although the Congress apparently thought the word needed definition because it enacted Section 2311, Title 18, U. S. C., defining "Securities" "as used in this chapter." Furthermore, Con-

gress thought it necessary to define "interstate commerce" by enacting Section 10, Title 18, U. S. C., but the Charge to the jury in this case left it to the jury to speculate as to its meaning.

It was declared by the Court of Appeals for the Tenth Circuit in *Miller v. United States,* 120 F. 2d 968 at 972:

> "In a criminal case, it is the duty of a court *to instruct on all essential questions of law, whether requested or not.*" (Emphasis supplied.)

In *United States v. Noble* (C. C. A. 3), 155 F. 2d 315, in which the lower court was reversed, it is stated:

> "The defendant asserts that the trial judge did not instruct the jury as to the nature and elements of the offenses which the defendant is alleged to have committed. He urges that it was the duty of the trial judge to include such instructions in his charge even in the absence of a request by the defendant to do so and that the failure to do so was reversible error.
>
> "We think it is self evident that a jury cannot perform its duty of determining the guilt or innocence of a defendant accused of a crime unless they know the essential elements of the crime which he is alleged to have committed. We think it equally self evident that the only appropriate source of that knowledge is the trial judge, whose traditional function has always included that of instructing the jury upon the law." (Pp. 316-317.)
>
> * * * * * * * *
>
> " . . . it is . . . essential that all instructions to the jury be given by the trial judge orally in the presence of counsel and the defendant. We con-

clude that the failure in the present case to instruct the jury upon the elements of the crime was error." (P. 318.)

With respect to the charge delivered to the trial jury in the instant case, we might state as was said by the Court of Appeals for the Third Circuit in 1945 in *United States v. Levy,* 153 F. 2d 995 at 999:

> "It was error of the highest degree to submit the case to the jury without adequate instructions as to the law allegedly violated by the defendant on trial and impels the reversal of the judgment."

Turning again to the Charge given in this Petitioner's trial:

> "A 'reasonable doubt' is as the words import a doubt which is based upon reason. If when you come to consider the evidence of the entire case there arises in your mind an uncertainty as to the truth and the certainty or uncertainty of the matters submitted, *such will be a reasonable doubt and you should give the defendant the benefit of it."* [R. 129; emphasis supplied.]

Give the defendant what "benefit"? The "benefit" to which such defendant would be entitled was to be acquitted *but this trial court did not so instruct!*

> ". . . The jury must be told at least once, in some unequivocal language, that if it believes from the evidence that defendant is innocent, or if it believes from the evidence that the Government has not proved each and every element of the crime beyond a reasonable doubt, it must return a verdict of not guilty."
>
> *Williams v. United States,* 131 F. 2d 22.

There is no such charge here.

If by any possible sound and legal reasoning the foregoing does not convince this court of the grave errors in this charge and that something more should be shown to compel a reversal of this case, that something lies in the part of the charge dealing with principals, aiders, abettors and accomplices.

The court charged:

> "At some parts of the proceedings one or more of the defendants took part. At other portions of the proceedings other members of the defendants took part. You are therefore charged on the subject of principals:
>
> "Whoever commits any act constituting an offense defined in any law of the United States or who aids, abets, counsels, commands, induces or procures the commission of such is a principal.
>
> "Anyone knowingly and voluntarily cooperating with, aiding, assisting, advising, or encouraging another in the commission of a crime is under the rules of evidence an accomplice, and *the witness Standish was such* . . ." [R. 130; emphasis supplied.]

Naturally citation of authority would seem unnecessary!

> "One cannot aid and abet in the commission of a crime unless there is another who has committed the offense. In other words, one cannot be an aider and abettor of himself in the commission of an offense."
>
> *Morgan v. United States* (C. C. A. 10, 1947), 159 F. 2d 85, 87.

This charge, therefore, was a flat declaration that Standish and one or more of *these defendants knowingly*

and voluntarily cooperated with each other in aiding, assisting or encouraging the commission of this crime. Otherwise Standish could not be an accomplice. Yet the trial court said he was! This was a direct charge that Standish and some one or more of the defendants was a guilty principal. Such conclusion is inescapable! Surely such an invasion of the province of a trial jury will not be approved.

The holding of the Court of Appeals in the instant case, *i.e.*, that the failure to object to the charges given waived the defects therein is in direct conflict with the holdings in *Samuel, Miller, Noble, Levy* and *Williams* above cited.

As to Question 2.

> Was the action of the District Court in denying petitioner's motions for judgment of acquittal error and were such rulings by the District Court in conflict with the decision of other courts of appeal on the same matter and with applicable decisions of this Honorable Court?

We feel all parts of this question should be answered in the affirmative.

In passing upon the point as to whether or not the trial court erred in denying petitioner's motions for judgment of acquittal the Court of Appeals said:

> "As against Brewer and Carter, the evidence was amply sufficient to sustain their convictions. The jury could have inferred that time for escape with the fraudulently acquired truckload of whiskey as a result of the transportation of the bogus check from Dallas, Texas, to Tulsa, Oklahoma, was part of their

> scheme; and, hence, that they caused the check to be transported in interstate commerce." [R. 147; Appendix 5.]

No *scheme* of any kind was charged in the indictment. Count I alleging a scheme or conspiracy was dismissed. It was not submitted to the jury. Petitioner and his co-defendants were tried on the substantive offense alone, viz., that he transported or caused to be transported in interstate commerce the check in question. The uncontradicted evidence is that the payee of the check did not deposit it *for collection* but made a normal deposit of it in the bank in Dallas [R. 47]. The money was placed in the payee's account in Dallas "just like cash" [R. 64]. It was endorsed "For Deposit Only" [R. 42] and was not left with the bank for collection.

Under such evidence there was no question for submission to the jury as to whether or not the petitioner and his co-defendants transported or caused to be transported the check in interstate commerce as squarely held by this Court in *Burton v. United States,* 196 U. S. 283, 49 L. Ed. 482.

In the *Burton* case the defendant, a United States Senator, was tried and convicted in the Eastern District of Missouri for having illegally accepted certain checks (described in Counts 6, 7, 8 and 9) payable in St. Louis but which the defendant deposited in his bank in Washington, D. C. That bank *credited the checks to Burton's account* and *thereafter sent the checks on to St. Louis* where they were paid. The court charged the jury that if

> "you find that the check in question was in fact deposited by the accused, with the intent and knowledge on his part, as well as on the part of the bank itself, that it should be forwarded to St. Louis for collec-

> tion . . . the bank and its correspondents acting as agents for the accused to make such collection, you should find that when the same was actually paid . . . at St. Louis by the trust company upon which it was drawn, it was, in contemplation of law, paid to the accused himself" (p. 300),

and in consequence the prosecution in St. Louis would lie. This Honorable Court said concerning the deposits of these checks in the Washington bank account of Burton that such deposit

> "was the ordinary case of the transfer or sale of the check by the defendant, and the purchase of it by the bank, and upon its delivery to the bank, under the circumstances stated, the title to the check passed to the bank, and it became the owner thereof. It was in no sense the agent of the defendant for the purpose of collecting the amount of the check from the trust company upon which it was drawn. *From the time of the delivery of the check by the defendant to the bank, it became the owner of the check;* it could have torn it up or thrown it in the fire or made any other use or disposition of it which it chose, and no right of defendant would have been infringed. The testimony of Mr. Brice, the cashier of the Riggs National Bank, as to the custom of the bank when a check was not paid, of charging it up against the depositor's account, *did not in the least vary the legal effect of the transaction;* it was simply a method pursued by the bank of exacting payment from the indorser of the check, and nothing more." (P. 297.) (Emphasis supplied.)

This Court then reviewed many cases and said:

> "A careful scrutiny of the evidence with relation to this charge to the jury shows that *there was no foundation for submitting to the jury the question of*

what was the understanding (other than such as arose from the transaction itself, as shown by uncontradicted evidence) between the defendant and the bank at the time when these various checks were deposited with the bank, and their proceeds *placed to the credit of the defendant.* There was no agreement or understanding of any kind other than such as the law makes from the transaction detailed, which was itself proved by uncontradicted evidence offered by the government itself. In the absence of any special agreement that the effect of the transaction shall be otherwise (and none can be asserted here), there is no doubt that its legal effect is a change of ownership of the paper, and that the subsequent action of the bank in taking steps to obtain payment for itself of the paper which it had purchased can in no sense be said to be the action of an agent for its principal, but *the act of an owner in regard to its own property.* The learned judge, in his charge to the jury, did not, indeed, deny the general truth of this proposition, but he left it to the jury to determine whether there was not an agreement or understanding made or arrived at by the parties at the time the checks were taken by the defendant to the bank, which altered the legal effect of the transaction actually proved. This, as we have said, there was not the slightest evidence of, and *it was error to submit that question to the jury.*" (P. 300.) (Emphasis supplied.)

* * * * * * * *

"In the case at bar the proof was not disputed. The checks were passed to the credit of defendant unconditionally, and without any special understanding. *The custom of the bank to forward such checks for collection is a plain custom to forward for collection for itself.* The only liability of defendant was on his indorsement. All this made a payment at Wash-

ington, and as a result there was a total lack of evidence to sustain the sixth, seventh, eighth, and ninth counts of the indictment. *The court should have, therefore, directed a verdict* of not guilty on those counts." (P. 303.) (Emphasis supplied; parenthesis not supplied.)

Burton v. United States, supra, is very much in point. If the Riggs Bank in which Burton's checks were deposited and where they were credited to Burton's account was the agent for Burton in transmitting those checks interstate to St. Louis for payment, the court in Missouri had jurisdiction in the prosecution. But this Honorable Court held the bank was not such agent and set aside the conviction, holding no jurisdiction was in the court in Missouri.

So in the instant case: the placing of the check in the Fair Park National Bank of Dallas at Dallas "for deposit only" and crediting the account of the payee of the check with the amount thereof resulted in the passing of title to the check to the Dallas bank and in transmitting it to Oklahoma the Dallas bank was in no sense the petitioner's agent. Therefore, neither this petitioner nor his co-defendants transported or caused to be transported the check in interstate commerce.

Kann v. United States, 323 U. S. 88, 89 L. Ed. 88, is highly pertinent. That case reached the Supreme Court, as declared by that court:

"On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit affirming a judgment of the District Court of the United States for the District of Maryland convicting the defendant of a violation of Sec. 215 of the Criminal Code by using the mails to defraud. . . . We

took this case because it involves important questions arising under Sec. 215 of the Criminal Code."

In the *Kann* case the indictment was in three counts involving three checks all drawn on Peoples Bank of Elkton, Maryland. The first and second checks (Counts 1 and 2, respectively) were payable to all the defendants and the check covered by Count 3 was payable to the defendant, Willis. The scheme to defraud was proven, and the only question was whether or not the defendants mailed or caused the checks to be mailed. Checks 1 and 2 were endorsed by the payees and cashed at the Peoples Bank of Elkton, Maryland; check 3, payable to Willis, was endorsed and deposited by him in his bank in Newark, Delaware (where it was credited to his account) and by that bank it was mailed to the Peoples Bank of Elkton, Maryland, and paid by that bank. The court then said:

> ". . . The banks which cashed or credited the checks, being holders in due course, were entitled to collect from the drawee bank in each case and the drawer had no defense to payment. The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires." (P. 95.)

In short, the court held that the defendants did not mail or cause the checks to be mailed and the convictions were reversed.

Pereira, et al. v. United States, 202 F. 2d 836, 347 U. S. 1, 98 L. Ed. 435, at first blush may appear to be

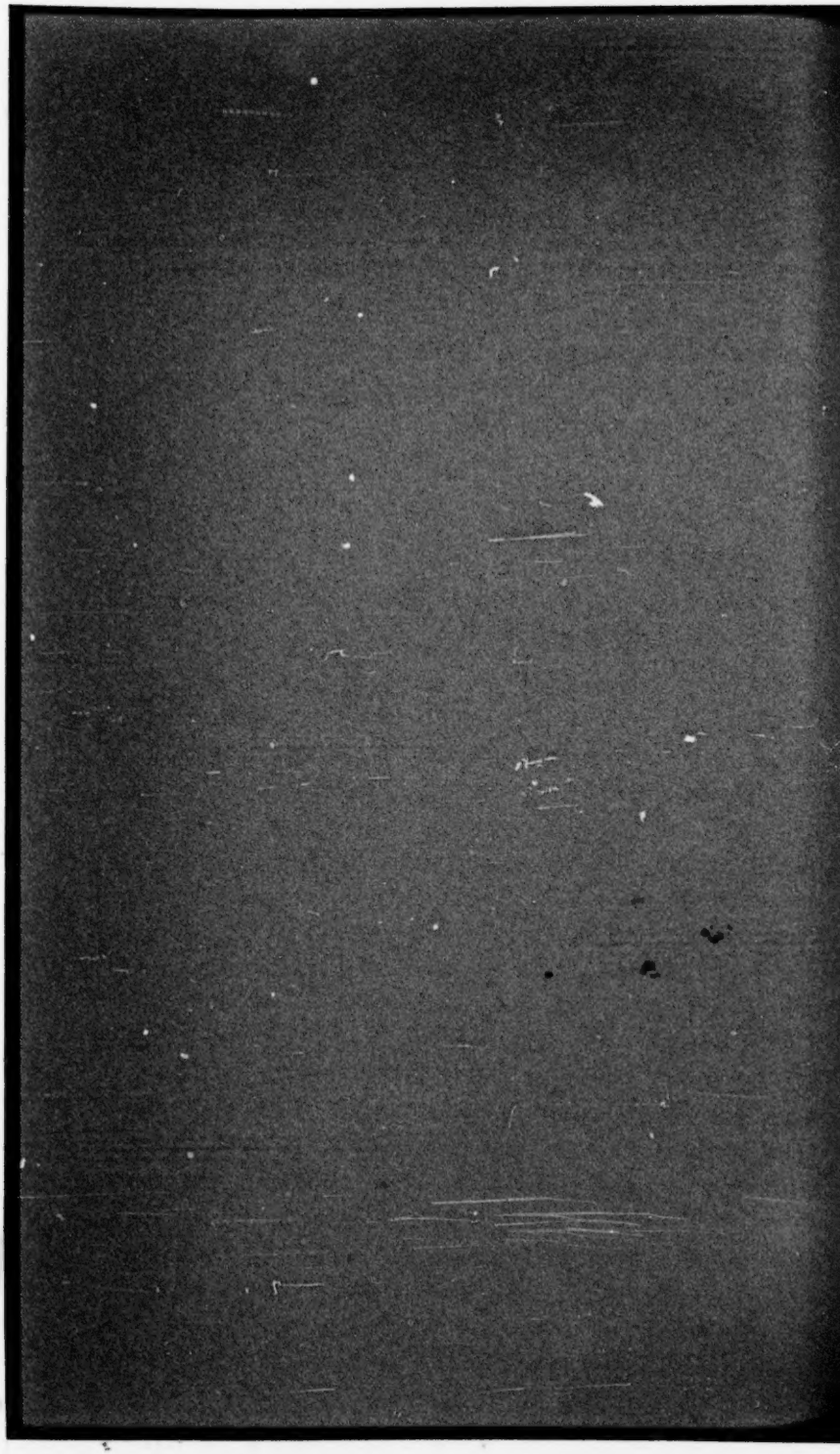
contrary to the present position of this petitioner, viz., that the act of the bank in Dallas in transporting the check to Oklahoma was not the act of this petitioner and his co-defendants. However, the *Pereira* case is clearly distinguishable in one very cardinal feature from the instant case. In the *Pereira* case the opinions of the Court of Appeals and of the Supreme Court clearly show that the victim's check was deposited by the defendant in the bank in El Paso *for collection*. It was not deposited and credited to the defendant's bank account in El Paso. At page 834 of the Report in 202 F. 2d the Court of Appeals said:

> "She (the victim) and Pereira went to El Paso where she endorsed the check to Pereira and placed it with the *bank for collection*, for which purpose *it was mailed* to the bank on which it was drawn in Los Angeles, California." (Emphasis supplied.)

Conclusion.

It is respectfully submitted that the Writ of Certiorari should issue.

DAVID H. CANNON,
Attorney for Petitioner, George William Brewer.



APPENDIX A.

Opinion of the United States Court of Appeals.

In the United States Court of Appeals for the Fifth Circuit.

George William Brewer, Herbert Ashley Carter and Jesse Ray Ortiz, Appellants, versus United States of America, Appellee. No. 15482.

Appeal from the United States District Court for the Northern District of Texas.

(July 15, 1955.)

Before HUTCHESON, Chief Judge, and RIVES and TUTTLE, Circuit Judges.

RIVES, Circuit Judge: The three appellants were indicted, along with a fourth defendant, Eugene Delbert Standish, for conspiracy to violate 18 U. S. C. A. 2314, and for the substantive offense of causing to be transported in interstate commerce, "to wit, from Dallas, Texas, to Tulsa, Oklahoma, a certain falsely made, forged, and counterfeited cashier's check, to wit, a certain cashier's check dated November 12, 1953, signed G. L. Metz, drawn on the Tulsa Bank of Commerce, Tulsa, Oklahoma, and made payable to J. & B. Liquors in the sum of $10,-117.00, and the said defendants, and each of them, then and there well knew the said check to have been falsely made, forged, and counterfeited." Standish pleaded guilty prior to the trial. The court, in its charge to the jury, submitted the case against the three appellants only on Count 2 charging the substantive offense, "which in the judgment of the court adequately covers the issues raised." The jury returned a verdict finding each of the three appellants guilty, and from the judgment and sentences which followed, this appeal is prosecuted.

Standish turned State's evidence, and was the first witness for the Government. He testified that Brewer and he "were the first ones to seize the idea of using a cashier's check to buy some whiskey with, a forged cashier's check," that he then discussed it with Carter and Ortiz at the same time, the first part of November, that he and Brewer went to a printing shop in Dallas operated by a man named Williams, and engaged him to print 100 cashier's checks on the Tulsa Bank of Commerce, a nonexistent bank, bearing a picture of a bank building, which was in reality the old Republic National Bank Building of Dallas, then the Davis Building. Carter also went with Standish on a trip to the print shop, but Ortiz did not. When finally obtained, the checks were brought by Standish and Carter to Brewer's house in Dallas and turned over to Brewer. The next day all four of them got together at a drug store and discussed getting a truck as a means of transportation for the whiskey. Standish had been out the preceding Monday night to the J. & B. Liquor Store to discuss the purchase of a large quantity of whiskey, telling Roland, a part owner of that store, that a man named Bill Craig, an assumed name for Brewer, would make the final arrangements. Friday afternoon about 3:00 or 3:30, all four men drove to a truck rental company where Standish rented a truck, drove it around the corner and turned it over to Ortiz, who then followed the other three defendants until within four or five blocks of the liquor store, when the other three parked while Ortiz went on with the truck to get the liquor. The three defendants in the car drove by the liquor store while the whiskey was being loaded, parked a short distance away, and when the truck came down the street, they followed it downtown, where they left it being driven by Ortiz. Standish further testified, that

the check protector used in preparing the check was obtained by Brewer, and that Brewer, Carter and he, but not Ortiz, were present when the check was made up and worked in its preparation. Standish turned the check over to Ortiz.

Williams, the operator of the printing shop in Fort Worth, testified to printing the checks upon Standish's request, that Brewer came to the shop with Standish on the first occasion, and Carter on a later trip, and that while Standish did most of the talking, "these other gentlemen cut in and had their say, too."

There was further testimony from the two partners who operated the liquor store, and from several bankers going to show the sale and delivery of the truckload of whiskey for the bogus cashier's check in the sum of $10,-117.00, and the subsequent sending of the check from Dallas, Texas to Tulsa, Oklahoma, where the discovery was made that no such bank existed as the drawee, Tulsa Bank of Commerce.

Robert S. Craig, who operates an office machinery business. produced an invoice and testified that he sold a Todd check "protectograph" to Brewer on November 12, 1953, the day before the bogus check was delivered. An FBI agent testified, that Brewer had given him a written statement in which he had denied purchasing any check protector.

One of the owners of the liquor store testified to a conversation with Ortiz when Ortiz delivered to him the bogus cashier's check and got the truckload of liquor, in effect that he had brought a cashier's check instead of money because, "Mr. Craig didn't trust him with that much cash," that Ortiz took the cashier's check out of an envelope and handed it to the witness' partner.

Neither of the three appellants testified in his own behalf or offered any other evidence.

The points raised on appeal are: (1) denial of a motion of each appellant for a judgment of acquittal; (2) a "manifestly unfair" trial; (3) refusal of a special requested charge on the effect of circumstantial evidence; and (4) general defectiveness and insufficiency of the district court's charge on the law of the case.

We have carefully read and considered the entire record, and find that the trial was conducted with every effort to afford the defendants a fair trial. In the absence of specific objections, the general charge of an unfair trial does not merit further discussion. Nor is it necessary to consider the general criticism of the court's oral charge to the jury, for the reason that when afforded an opportunity to object to that charge, no objection or exception was forthcoming from counsel for the defendants, except the following: "The only one we have, we except to the action of the court in failing to submit our charge on circumstantial evidence, being Charge Number One."

The court had charged the jury that the burden was upon the Government to prove guilt beyond a reasonable doubt. There was no reversible error in refusing the circumstantial evidence charge. Holland v. United States, 348 U. S. 121, 139; Pereira v. United States, 5th Cir., 202 F. 2d 830, 836, aff'd 347 U. S. 1.

As against Brewer and Carter, the evidence was amply sufficient to sustain their convictions. The jury could have inferred that time for escape with the fraudulently acquired truckload of whiskey as a result of the transportation of the bogus check from Dallas, Texas to Tulsa, Oklahoma was a part of their scheme; and, hence, that they caused the check to be transported in interstate com-

merce. As to Ortiz, the evidence is not so strong as that against Brewer and Carter to show his knowledge of the fraudulent scheme, including the interstate transportation of the check. Standish did, however, testify that he discussed the scheme with him, and the testimony of Levey, one of the owners of the liquor store, and the furtive and suspicious circumstances throughout, obvious to Ortiz or anyone else, were, we think, sufficient corroboration and evidence to authorize the jury to return a verdict of guilty against him.

The judgments are therefore AFFIRMED.

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 432

GEORGE WILLIAM BREWER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1-5) is reported at 224 F. 2d 189.

JURISDICTION

The judgment of the Court of Appeals was entered on July 15, 1955 (Pet. App. 1). A petition for a rehearing was denied on September 3, 1955. The petition for a writ of certiorari was filed on September 29, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner caused a fraudulent check to be transported in interstate commerce.

2. Whether there was reversible error in the trial court's charge to the jury.

STATUTE INVOLVED

18 U.S.C. 2314 provides in relevant part:

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

Petitioner was tried with two other defendants under a two-count indictment charging the violation, and a conspiracy to violate, 18 U.S.C. 2314, in that they had caused to be transported in interstate commerce a falsely made, forged and counterfeited cashier's check (R. 1-5). The case was submitted to the jury only on count 2 charging the substantive offense (R. 128). Petitioner was found guilty and sentenced to imprisonment for seven years (R. 5-7). On appeal, the conviction was affirmed (Pet. App. 5).

At the trial, the Government relied in part upon the testimony of a fourth man, who had previously pleaded guilty to the charges (R. 10). It produced

evidence to show that in Dallas County, Texas, petitioner and his co-defendants concocted a plan to use a forged cashier's check to secure a large quantity of whiskey (R. 11). In furtherance of the plan the defendants had cashier's check forms printed on the "Tulsa [Oklahoma] Bank of Commerce," a nonexistent bank (R. 12-15, 33-37). They filled in one of these forms for the sum of $10,117.00, using a check protector obtained by petitioner (R. 31), and signed a fictitious name to represent the vice president of the nonexistent bank (R. 42, 26). They submitted this bogus check to a Dallas liquor dealer in supposed payment for a truck-load of whiskey (R. 46, 47). The liquor dealer deposited the check in his account in the Fair Park National Bank of Dallas, Texas (R. 47). That bank sent it in regular channels through the Republic National Bank of Dallas (R. 101, 105, 108) to the National Bank of Commerce at Tulsa, Oklahoma, where it was discovered that it was a false instrument (R. 115, 116).

Petitioner offered no evidence (R. 127). His motions to dismiss and for judgment of acquittal were denied (R. 127, 128).

The trial court, in instructing the jury, reviewed the count which it submitted (R. 128, 129) and charged with respect to proof of guilt as follows (R. 129):

> The * * * three defendants * * * have entered their pleas of not guilty which places the burden upon the government to prove

their guilt as charged in the indictment by competent evidence beyond a reasonable doubt.

A "reasonable doubt" is as the words import a doubt which is based upon reason. If when you come to consider the evidence of the entire case there arises in your mind an uncertainty as to the truth and the certainty or uncertainty of the matters submitted, such will be a reasonable doubt and you should give the defendant the benefit of it.

* * * * *

So now if you find and believe from the evidence submitted to you, beyond a reasonable doubt, that the said defendants did on or about the time stated in said indictment transport and cause to be transported such security as charged, then you will find the defendants guilty. If you have a reasonable doubt of such, you will find them not guilty.

The court further explained the question of federal jurisdiction, specifically charging the jury that it must find the defendants not guilty if it found that they did not transport, or cause to be transported, the check across the state line (R. 131). In this connection it pointed out that the defendants would not be guilty if it appeared that the liquor dealer or any of the banks forwarding the check across the state line knew that it was

fraudulent but continued its transportation (R. 131).

In instructing the jury with regard to the credibility of witnesses, the trial court identified the Government's witness who had previously pleaded guilty as an accomplice whose testimony should "be received with caution and weighed and scrutinized with care by the jury" (R. 130, 131).

ARGUMENT

1. Mistakenly relying upon *Kann* v. *United States,* 323 U. S. 88, and ignoring the squarely controlling decision in *United States* v. *Sheridan,* 329 U. S. 379, petitioner contends (Pet. 11-17) that he could not be convicted for causing interstate transportation of the forged check because, when the payee received credit for it, the bank became a holder in due course and forwarded the check, not as agent of the petitioner or the payee, but for its own purposes. Precisely this argument—that where the offense is causing the interstate transportation of a forged check, the transportation must be in aid of the fraud—was considered and rejected in *Sheridan.* There, as had been repeatedly emphasized in the *Kann* case itself (see 323 U. S. at 93, 94, 95), it was made clear that the result in the latter (reversal of a conviction under the mail fraud statute for failure to show that use of the mails furthered the fraudulent scheme) rested on the fact that the mail fraud statute prohibited the use of the mails "for the purpose of executing" a fraudulent scheme. Under the dif-

ferent statute involved in *Sheridan* and this case, this Court held, Congress intended to exclude forged securities, like stolen goods, from interstate transportation, and undertook not only to prevent frauds or the completion of frauds partially executed, but also to aid the states in detecting and punishing criminals who use the channels of interstate commerce to delay or defeat apprehension. See also *Pereira* v. *United States,* 347 U. S. 1.

Accordingly, it is clear in the present case that petitioner "caused" the unlawful transportation within the meaning of 18 U. S. C. 2314. Like the defendant in *Sheridan* (see 329 U. S. at 391), petitioner knew that the fraudulent check would cross state lines, since it was presented in Texas and had ostensibly been drawn on an out-of-state bank. See 18 U. S. C. 2; *Pereira* v. *United States, supra,* at 9; *Kann* v. *United States, supra,* at 93. Given these decisive facts, it makes no difference that petitioner and his accomplices had obtained the liquor they wanted with the forged check before the check was sent across the state line.

2. As to the trial court's charge to the jury (Pet. 6-11), the record shows that when petitioner was given the opportunity to object, he took no exception.[1] In any event, his present attempts to find error (Pet. 6-11) are without merit. There

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[1] Counsel for co-defendant made only the following exception (R. 132), which petitioner does not urge:

> The only one we have, we except to the action of the Court in failing to submit our charge on circumstantial evidence, being Charge Number One.

was no need to charge on what constituted a fraudulent security (Pet. 6-7), for there was no dispute that the check on a nonexistent bank was such a security. The judge did charge that, if the jury had a reasonable doubt as to petitioner's guilt, they should acquit (compare Statement, *supra*, p. 4, with Pet. 9). And the charge that Standish was an accomplice was obviously proper, since his own testimony showed him to be such. It is frivolous to argue, as petitioner does (Pet. 10-11), that this warning to treat accomplice testimony warily —a caution given for petitioner's protection—suggested the other defendants' guilt because "accomplice" necessarily implies other participants.

Since there was in the charge no error affecting substantial rights, the court below properly refused to consider on appeal the general criticism directed broadly at the charge as a whole. Rules 30 and 52(b), Federal Rules of Criminal Procedure.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER, 1955.

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